

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

COSME IBARRA-ROSAS,
Defendant.

No. CR-98-2135-FVS

ORDER DENYING RECONSIDERATION

THIS MATTER comes before the Court based upon the defendant's motion for reconsideration of an order denying his request for post-conviction relief. The defendant is representing himself. The government is represented by Assistant United States Attorney Gregory M. Shogren.

BACKGROUND

The defendant sought post-conviction relief under 28 U.S.C. § 2255. On August 25, 2005, the Court denied the defendant's request. He moves for reconsideration. He says the Court erred by concluding that the judgment at issue here had become final by the time *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *United States v. Booker*, 543 U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), were decided, and that, under the standard set forth in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989),

1 neither case applied retroactively. The defendant's request is
2 governed by a familiar standard. Reconsideration is appropriate if
3 the Court "(1) is presented with newly discovered evidence, (2)
4 committed clear error or the initial decision was manifestly unjust,
5 or (3) if there is an intervening change in controlling law." *School*
6 *District No. 1J Multnomah County*, 5 F.3d 1255, 1263 (9th Cir.1993)
7 (citations omitted).

8 **RULING**

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10 The defendant argues that *Blakely* and *Booker* merely clarify the
11 holding of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147
12 L.Ed.2d 435 (2000). In his opinion, neither case sets forth a new
13 rule of criminal procedure within the meaning of *Teague*. Moreover,
14 since his conviction was not final when *Apprendi* was decided, he
15 argues that he is entitled to the benefit of any subsequent decision
16 that merely clarifies *Apprendi*. While ingenious, these arguments are
17 foreclosed by *United States v. Cruz*, No. 03-35873, 2005 WL 2243113
18 (9th Cir. Sept. 16, 2005) (per curiam). In that case, the Ninth
19 Circuit said, "*Booker* is not retroactive, and does not apply to cases
20 on collateral review where the conviction was final as of the date of
21 *Booker's* publication." *Id.* This is just such a case. The Ninth
22 Circuit affirmed the defendant's conviction on August 22, 2001, but
23 vacated his sentence and remanded for resentencing consistent with
24 *Apprendi*. He was resentenced, and, on April 10, 2003, the Ninth
25 Circuit affirmed the new sentence. Thus, both his conviction and
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1 sentence became final well before *Booker* was decided. This Court did
2 not err in so ruling. The defendant is not entitled to
3 reconsideration.

4 **IT IS HEREBY ORDERED:**

5 The defendant's motion for reconsideration (**Ct. Rec. 169**) is
6 denied.

7 **IT IS SO ORDERED.** The District Court Executive is hereby
8 directed to enter this order and furnish copies to the defendant and
9 to counsel for the government.

10 **DATED** this 14th day of October, 2005.

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12 s/ Fred Van Sickle
13 Fred Van Sickle
14 United States District Judge
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